

# **EXHIBIT 9**

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE EASTERN DISTRICT OF VIRGINIA  
 3 RICHMOND DIVISION

5 -----  
 6 ePLUS, INC. : Civil Action No.  
 7 vs. : 3:09CV620  
 8 LAWSON SOFTWARE, INC. : July 28, 2010  
 9 -----

10 COMPLETE TRANSCRIPT OF THE MOTIONS HEARING  
 11 BEFORE THE HONORABLE ROBERT E. PAYNE  
 12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 Scott L. Robertson, Esquire  
 15 Michael G. Strapp, Esquire  
 16 Jennifer A. Albert, Esquire  
 17 Goodwin Procter, LLP  
 18 901 New York Avenue NW  
 19 Suite 900  
 Washington, D.C. 20001  
 20 Craig T. Merritt, Esquire  
 21 Christian & Barton, LLP  
 22 909 East Main Street  
 23 Suite 1200  
 Richmond, Virginia 23219-3095  
 24 Counsel for the plaintiff

24 Peppy Peterson, RPR  
 25 Official Court Reporter  
 United States District Court

1 P R O C E E D I N G S

2  
 3 THE CLERK: Civil action number 3:09CV00620, ePlus,  
 4 Inc., versus Lawson Software, Inc. Will counsel please state  
 5 their names for the record and identify the parties they  
 6 represent.  
 7 MR. MERRITT: Greg Merritt, Christian & Barton, for  
 8 ePlus.  
 9 MR. ROBERTSON: Scott Robertson, Goodwin Procter  
 10 firm. With me are my partners.  
 11 MR. STRAPP: Michael Strapp.  
 12 MS. ALBERT: Jennifer Albert.  
 13 MR. CARR: Dabney Carr, Troutman Sanders, for Lawson  
 14 Software.  
 15 MR. McDONALD: Good morning, Your Honor. Dan  
 16 McDonald, Merchant & Gould, representing Lawson Software, and  
 17 with me today, I'd like to introduce Kirstin Stoll-DeBell, also  
 18 with Merchant & Gould, also representing Lawson Software.  
 19 MS. STOLL-DeBELL: Good morning.  
 20 THE COURT: Morning. I always think it's a good idea  
 21 to throw counsel a curve ball. I always enjoyed it so much  
 22 when judges did it to me.  
 23 I've decided, upon further reflection, that I would  
 24 like to hear your views on the damages issue reflected in  
 25 Lawson's -- what is it, motion in limine number one? Is that

1 APPEARANCES: (cont'g)

2 Dabney J. Carr, IV, Esquire  
 3 Troutman Sanders, LLP  
 4 1001 Haxall Point  
 5 Richmond, Virginia 23219  
 6 Daniel W. McDonald, Esquire  
 7 Kirstin L. Stoll-DeBell, Esquire  
 8 Merchant & Gould, PC  
 9 80 South Eighth Street  
 10 Suite 3200  
 11 Minneapolis, Minnesota 55402  
 12 Counsel for the defendant

2

4

1 what it is?  
 2 MR. McDONALD: That's one of them, Your Honor.  
 3 There's one, two, and three all related to the damages issue.  
 4 THE COURT: I mean the settlement.  
 5 MR. McDONALD: That's where you want to start?  
 6 THE COURT: No, we'll start with the motion for  
 7 summary judgment, but I would like somebody to -- I'd like for  
 8 you to address that. I don't want a lot of -- we don't have a  
 9 lot of time to do this, and we've got a lot to do, so get right  
 10 to the point. All right, the motion for summary judgment on  
 11 the written description.  
 12 MR. McDONALD: Thank you, Your Honor. May it please  
 13 the Court, I have some binders with PowerPoint slides I'd like  
 14 to hand up.  
 15 THE COURT: Is that a question of law or fact?  
 16 MR. McDONALD: It's a question of fact, but the facts  
 17 are undisputed. Can I hand up the binders?  
 18 THE COURT: I'm sorry, it's in paragraph four of what  
 19 is to be argued.  
 20 MR. McDONALD: That was just a fast ball, not a curve  
 21 ball.  
 22 THE COURT: I don't know. Maybe that was a slider.  
 23 All right.  
 24 MR. McDONALD: Is the PowerPoint visible on the  
 25 screen right now for Your Honor?

06:57:43 1 Now, to the extent that Dr. Shamos can offer evidence  
 06:57:56 2 focused only on those claims and why they anticipate it, he's  
 06:58:04 3 not bound by the evidence offered at the time of the second  
 06:58:08 4 supplemental. He can offer, just like Dr. Weaver can offer,  
 06:58:12 5 additional evidence directed to the same proposition, but that  
 06:58:16 6 isn't what he did.

06:58:17 7 What he did is, he went out and he concocted a whole  
 06:58:21 8 new game, and he's not going to be allowed to testify to it,  
 06:58:26 9 and he can't now go back and find all these references that he  
 06:58:32 10 constitutes -- that you all say on your side, Lawson, is new  
 06:58:37 11 evidence in support of the old contention. He's bound to those  
 06:58:42 12 things that were in his report on which he relied to support  
 06:58:49 13 the anticipations identified in the 14 claims.

06:58:54 14 I hope that everybody is clear on that, and in that  
 06:58:58 15 way, Lawson and ePlus are going to be treated the same. But I  
 06:59:05 16 don't believe the big difference is that Shamos didn't confine  
 06:59:11 17 himself to the original contentions as did Weaver when he  
 06:59:15 18 confined himself to the original infringement contentions and  
 06:59:20 19 then offered more evidence than, in fact, was referred to  
 06:59:25 20 earlier.

06:59:27 21 That's permissible for him, and it would be for Dr.  
 06:59:32 22 Shamos had he done that. I don't see that he did it, but if  
 06:59:38 23 you can show he did it, he did it, but let me tell when you  
 06:59:41 24 come to trial, when you have him on the witness stand, you  
 06:59:44 25 better have something to hand up to me to show me exactly how

07:01:56 1 confederacy, dressed up like his wife in a dress and headed  
 07:02:00 2 out. We can't have that.  
 07:02:02 3 I don't see how any of this evidence bears on the  
 07:02:10 4 damages issue, nor do I see how the evidence that 6.5 -- six  
 07:02:17 5 and 5V systems and earlier are substantially the same as the  
 07:02:23 6 8.0.3 systems that are accused has any probative value as to  
 07:02:30 7 the willfulness issue, and to the extent that it has value on  
 07:02:35 8 that issue, i.e., to the extent it's relevant on that issue,  
 07:02:40 9 the presentation of that evidence would offend Rule 403 because  
 07:02:45 10 it would cause delay, confusion, and make side trials out of a  
 07:02:51 11 very difficult case already, and the jury, I expect, I  
 07:02:57 12 anticipate would be hopelessly confused.

07:03:03 13 With the help of a mind substantially better than my  
 07:03:09 14 own, for sometime I have been trying to understand what's been  
 07:03:13 15 going on in this area, and if I can get confused by it, I have  
 07:03:17 16 every confidence that a jury can. I have to make sure what I'm  
 07:03:21 17 doing every time that I deal with this issue just to avoid  
 07:03:26 18 confusion.

07:03:28 19 I don't think it's pertinent to lack of specific  
 07:03:31 20 intent to induce infringement either or to discredit ePlus's  
 07:03:36 21 infringement and damages contention for the same reason. To  
 07:03:39 22 the extent it might be relevant, it's a 403 analysis, and the  
 07:03:47 23 use of the pre-2002 systems don't do anything but provide  
 07:04:02 24 confusion, delay.

07:04:08 25 Also, to the extent that Shamos is proffered to

06:59:47 1 and where and when it -- what he's testifying to relates back  
 06:59:54 2 to those original claims because he has, I've been able to tell  
 06:59:59 3 from what I've been given, a propensity to roam and wander, and  
 07:00:03 4 you better get him back on the reservation, because if he roams  
 07:00:08 5 and wanders and I have to tell him more than once, he will be  
 07:00:11 6 roaming and wandering out the back door.

07:00:13 7 And the same is true for Dr. Weaver. They're not  
 07:00:17 8 going to take over the courtroom and do what they want to do.  
 07:00:20 9 It's going to be done according to the rules.

07:00:23 10 The same is true for these obviousness combinations,  
 07:00:34 11 41 brand new ones. They weren't disclosed. Now, if he  
 07:00:44 12 identified Gateway references originally that were other than  
 07:00:53 13 the 2000/MRO manual, he can testify about that. If he didn't,  
 07:00:59 14 he can't.

07:01:02 15 The next issue is whether this evidence of Shamos's  
 07:01:09 16 that you're fighting over is relevant to the issue of damages.  
 07:01:13 17 It is said that it's relevant to the issue of non-infringing  
 07:01:17 18 alternative. I don't believe that that's been established.

07:01:19 19 It is true that the original orders on this point  
 07:01:23 20 that we were dealing with dealt with invalidity contentions,  
 07:01:27 21 but you can't get in all these extrinsic information that  
 07:01:32 22 really relate to points of invalidity under the guise of  
 07:01:39 23 something else. In other words, you can't dress them up in  
 07:01:42 24 another dress and send them out into the world. That would be  
 07:01:50 25 like -- would be like what Jefferson Davis did to lead the

07:04:27 1 testify to something on infringement, he already testified that  
 07:04:31 2 he didn't study the information on it for infringement  
 07:04:36 3 purposes. He did it for invalidity purposes, that is the  
 07:04:41 4 information we're talking about, and so his opinions on that  
 07:04:48 5 point that are repeated in the infringement issue from the  
 07:04:51 6 invalidity issue are not either relevant, nor do they fit --  
 07:05:00 7 nor do they satisfy the fit part of *Daubert*.

07:05:07 8 All right, I think that takes care of all the issues  
 07:05:09 9 in that motion. Now we have defendant's motion number five.  
 07:05:49 10 Who is going to do that?

07:05:51 11 MS. STOLL-DeBELL: I am, Your Honor. Just gathering  
 07:05:55 12 my stuff.

07:05:58 13 THE COURT: You know what? It might be the best  
 07:06:00 14 thing to do is let Mr. Robertson go first and explain just  
 07:06:05 15 exactly who is testifying to what so that I get that fixed in  
 07:06:09 16 my mind. That's this motion, isn't it? Do we have the right  
 07:06:12 17 one, limit to one expert on infringement and one on invalidity?

07:06:17 18 MS. STOLL-DeBELL: Yes, that's right. I can tell you  
 07:06:19 19 also.

07:06:20 20 THE COURT: You want to do it? Why don't you go  
 07:06:22 21 ahead. Since you're planning to do it, you go ahead. Which  
 07:06:24 22 one of these tabs is it? Five.

07:06:32 23 MS. STOLL-DeBELL: We're looking at slide number 38.  
 07:06:36 24 Does that help you?

07:06:36 25 THE COURT: Let me get your book first. All right.

09:06:03 1 but at least it is irrelevant as to the method -- I mean as to  
 09:06:08 2 the apparatus even in the acknowledgment of the defendant, and  
 09:06:13 3 it is -- it is not cumulative evidence, it being the only  
 09:06:19 4 actual system that shows the RQ in operation in the hands of  
 09:06:25 5 the customer, and the prejudicial aspect, I think, that would  
 09:06:28 6 arise from the missteps that the woman made can be cured by  
 09:06:34 7 just letting the jury see the videotape and see how it works.  
 09:06:39 8 But I'm going to instruct you both to review it carefully, and  
 09:06:43 9 if what we've got is a comedy of errors, it's not going to come  
 09:06:47 10 in because that's wasteful of the jury's time. So the motion  
 09:06:52 11 will be provisionally denied.

09:06:59 12 That leaves me with a few things to do; is that  
 09:07:02 13 right? We don't have any more motions to argue; is that right?  
 09:07:07 14 MR. McDONALD: That's correct, Your Honor. Your  
 09:07:09 15 Honor, I wonder if I would have leave because I have a  
 09:07:12 16 seven o'clock flight.

09:07:13 17 THE COURT: Hit the road.  
 09:07:15 18 MR. McDONALD: Thank you.  
 09:07:17 19 THE COURT: You are cutting it close as it is.  
 09:07:19 20 MR. McDONALD: I agree. Thank you, Your Honor.  
 09:07:24 21 THE COURT: All right, Mr. McDonald is gone, but  
 09:07:27 22 we're going to go. You all have a time to talk with Judge  
 09:07:35 23 Dohnal?  
 09:07:35 24 MR. ROBERTSON: August 19th.  
 09:07:36 25 MR. CARR: Correct, Your Honor.

09:07:38 1 THE COURT: August 19th. Both of you have some  
 09:07:42 2 problems in the case, folks, problems that warrant a serious  
 09:07:47 3 look at whether you're going to settle it or not, and I will  
 09:07:53 4 say -- I wasn't saying this for settlement purposes. I  
 09:07:58 5 genuinely believe that your damages case takes a hit for the  
 09:08:03 6 reasons that I expressed, and I wasn't trying to communicate  
 09:08:06 7 that for purposes of inviting you all to settle, but whereas  
 09:08:12 8 here you have liability problems, and you might make sure you  
 09:08:16 9 communicate this to Mr. McDonald, and you do, I think, have  
 09:08:20 10 some liability problems, and they have damage problems.  
 09:08:24 11 That usually provides a reasonably efficacious way in  
 09:08:29 12 which to try to reach an accommodation that businesspeople can  
 09:08:33 13 live with. All right? Thank you. We will be in adjournment.

14

15 (End of proceedings.)

16

17

18 I certify that the foregoing is a correct transcript  
 19 from the record of proceedings in the above-entitled matter.

20

21

22 /s/  
 23 P. E. Peterson, RPR

Date \_\_\_\_\_

24

25